Filed 10/23/12 Dodds v. Meng CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES DODDS et al., Plaintiffs and Appellants, v. HSIN-HUI MENG et al., Defendants and Respondents.	D058766 (Super. Ct. No. 37-2009-00085219-CU-MC-CTL)
JAMES DODDS et al., Plaintiffs and Appellants, v. CHI-HSIEN LEE et al., Defendants and Respondents.	D059409 (Super. Ct. No. 37-2009-00085219-CU-MC-CTL)

CONSOLIDATED APPEALS from judgment and postjudgment orders of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed in part, reversed in part.

I. INTRODUCTION

These appeals arise from a judgment entered after a jury trial in a shareholder derivative suit brought by plaintiffs and appellants James Dodds, Dudley McIlhenny and Gail Peterson (collectively, plaintiffs), solely in their capacity as shareholders of One Easy Loan, Inc. (OEL). Plaintiffs sued defendants and respondents Chi-Hsien Lee, also known as Marcus Lee (Lee), David Wei (Wei), and Priority Student Loans, Inc. (PSL), and also defendant Hsin-Hui Meng, known as Christine Meng, for breach of fiduciary duty and diversion of corporate opportunities and corporate assets. Lee, Wei, and Christine Meng were all former directors of OEL. The jury found these defendants (except for Christine Meng) liable and awarded plaintiffs $187,898.

Plaintiffs appeal only the damages award. They assert that in this shareholder derivative suit, which is equitable in nature, the jury's verdict by law was advisory only, and consequently, the trial court should have rejected the relatively low sum awarded by the jury because it was based on a calculation tainted by legal error. More specifically, plaintiffs contend that the proper measure of damages is the value of the stock of the now-defunct OEL, as of the time the defendants' wrongdoing. The jury did not award that sum, plaintiffs contend, but instead, at the improper urging of defense counsel during closing argument, it calculated only plaintiffs' individual shares of that destroyed value and then deducted from that amount hundreds of thousands of dollars defendants erroneously claimed as setoffs. Plaintiffs ask us to reverse the judgment as to damages and remand either with instructions to enter the correct damages, or to hold a new trial on the issue of damages. Plaintiffs also challenge postjudgment orders denying them prejudgment interest and the recovery of certain costs.

We agree with plaintiffs that this is a shareholder derivative action, and under California law, there is no right to a jury trial in such a case. The jury's verdict, therefore, was, and could only have been, advisory. For the reasons explained in this opinion, we conclude the court erred in not treating the verdict as advisory, and that error was prejudicial as to damages. We also conclude that it was prejudicial error to permit defendants' counsel to assert in closing argument that the damages in this case should be limited to the value of plaintiffs' shares only, as further reduced by claimed setoffs of which defendants had given no prior notice, and which they failed to plead in their answer, as required by law.

Accordingly, we reverse the damages portion of the judgment. In all other respects the judgment is affirmed. Consistent with this determination, the trial court's order denying prejudgment interest is vacated. Its order denying plaintiffs certain costs, however, is affirmed.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Rise and Fall of OEL*

This case arises from the demise of OEL, a company founded in 2002 by Dodds for the purpose of providing a vehicle for students with multiple loans to consolidate those loans with a single lender, resulting in commissions for OEL. Dodds brought Lee, a software programmer, into the company in 2002 to provide technical expertise. In 2004, Lee suggested to Dodds that they bring on board a friend of Lee's, Wei, to provide critically needed funding for the company. Wei initially loaned $250,000 to the company, in return for which he received 30 percent of OEL's stock. As of 2006, Wei and Lee each owned 30 percent of OEL's stock, giving them jointly a controlling share. Dobbs owned 30 percent, and a group of other shareholders together owned 10 percent. Dobbs and Lee were both directors of the company at that time. Dobbs was also President and Chief Executive Officer.

Although the company struggled for the first few years, by 2005 it had turned the corner and appeared well-positioned to become profitable. However, trouble began in the latter half of that year, when Dobbs suffered a severe health crisis and could not function in his executive role for an extended period of time. Around that time, plaintiffs contended, Lee and Wei realized how profitable the student loan consolidation could become, particularly because of expected favorable regulatory changes, and they began to take steps to essentially run OEL out of business by looting its valuable software and other assets, draining its funds, diverting the company's opportunities, and using those assets to start up their own competing business. In December 2005, the shareholders met and elected Wei as a director.

By early 2006, Dodds had become suspicious of Lee's and Wei's activities and motives, and their relationship soured. Wei demanded repayment of his $250,000 loan, with 100 percent interest, and he received that. But that transaction, and others, depleted OEL's cash holdings. Dodds, Lee and Wei made additional loans of $175,000 each to OEL. Nevertheless, the situation worsened. Wei, asserting that he was not and never intended to be a director, resigned that position in March 2006. Also in March 2006, Dodds was forced out as CEO (although at trial defendants disputed Dodds' version of his departure). At that time, Dodds asked for his final paycheck, commissions, and reimbursement for expenses—a sum totaling approximately $86,000. Although Lee and Wei dispute the precise circumstances surrounding this payment, the record indicates they accompanied Dodds to the bank where he cashed the check and transferred his check-signing authority to Lee and Wei. Later, at Lee's request, Dobbs reimbursed $4,000 in expenses to OEL.

Also during March 2006, the parties discussed a proposal whereby Wei and Lee would buy out the minority shareholders' stock. A document admitted at trial indicated that the total valuation of the buyout, including the value of all of OEL's stock as well as the value of a related company and other assets as of March 2006, was $4,066,296.25. According to plaintiffs, both Lee and Wei had agreed with the numbers being discussed. The minority shareholders, including Dodds, all approved the buyout agreement, as did Lee. Wei, however, did not sign the agreement. Instead, Wei insisted on adding a noncompete clause to the agreement, to which Dodds would not agree. The proposed deal was not consummated.

With Dodds no longer in charge of the company's operations, Lee and Wei began to dismantle the company and focus on setting up their own competing business. Most of OEL's employees were fired. Some of the remaining employees, plaintiffs contended, used OEL's computers to work on logos and websites for potential new companies, using OEL's own logo and website as templates. On March 31, 2006, a shareholder meeting was held at which Lee's wife, Christine Meng, was elected as a director and appointed

OEL's treasurer. After that time, OEL became essentially an empty shell and daily operations ceased in April 2006. Lee and Wei started a new company, defendant PSL, with many of the opportunities and assets Lee and Wei had diverted from OEL. OEL was formally dissolved in December 2006.

B. *The First Litigation Between the Parties*

The parties first took their differences to court in May 2006, when Lee and Wei, as individuals, sued Dodds and OEL, seeking a voluntary dissolution of OEL, an accounting, damages, and restitution from Dodds, alleging that Dodds made negligent and fraudulent misrepresentations about OEL's prospects to induce Lee and Wei to invest their money and expertise in OEL; that he mismanaged the company; and that he misappropriated or embezzled funds from the company. (*Lee v. Dobbs* (Super. Ct. San Diego County, 2006, No. GIC866164 (*Lee v. Dobbs*).) Dodds, in his individual capacity, filed a cross-complaint against Lee, Wei, Christine Meng and PSL, alleging wrongdoing by defendants that eventually became the basis for the instant action.

The trial court ultimately sustained Lee and Wei's demurrer to Dodds' cross-claims, without prejudice, on the ground that they were properly derivative claims, not individual claims. As further described below, Dodds filed this shareholder derivative action against the same defendants on March 13, 2009. Then, on October 23, 2009, Dodds and James Wakefield, Lee and Wei's counsel (who also represented defendants in this action), appeared before the Hon. William R. Nevitt, Jr. in San Diego Superior Court, to announce that they had reached a settlement in *Lee v. Dobbs*. On the record, defendants' counsel recited to Judge Nevitt the material terms of the settlement—

including dismissals with prejudice of both the main action and Dodds' cross-complaint, along with "mutual releases"—and stated that he had "written confirmation of [defendants'] agreement to this settlement." Counsel clarified that the "derivative action" (essentially, the substance of Dobbs cross-complaint) would continue. The court stated that if written dismissals were not filed within 45 days the case automatically would be dismissed. Written dismissals were not filed, and the court ultimately dismissed the case without prejudice.[1]

C. *The Current Litigation, Trial and Jury Verdict*

As noted, on March 13, 2009, Dodds commenced this case, together with McIlhenney and Peterson, suing defendants in their capacity as shareholders of OEL. OEL was named as a nominal defendant. The complaint alleged three causes of action for diversion of corporate assets, diversion of corporate opportunities, and breach of fiduciary duties, and sought the imposition of a constructive trust against the assets and stock of PSL, as well as damages. Plaintiffs made no claims as individuals. Defendants belatedly filed an answer on August 10, 2009. The answer consisted of a general denial, along with 14 affirmative defenses, including several addressed to the issue of damages. Defendants averred, among other things, that plaintiffs either suffered no damages, or if they did, it was in a much smaller amount than they alleged, or those damages were not

---

1 Defendants' request that we judicially notice the trial court's order of dismissal is granted. (Evid. Code §§ 452, subds. (d), (h).)

the result of the acts or omissions by these defendants. The case initially was assigned to Superior Court Judge Steven R. Denton.

In preparation for trial, plaintiffs filed two motions in limine relevant to this appeal. The first, styled a motion "To Order Proof of Issues at Trial" (Motion in Limine No. 1), asked the court to order trial of the issues "in the most efficient way possible," and specifically stated that "issues of fact must be tried to the jury." The motion cited law to the effect that the court "properly takes *advisory* verdicts from the jury on factual issues which are intertwined with plaintiffs' equitable claims and remedies," and should decide "equitable issues **after** the jury decides the factual and legal issues." (Bold in original, italics added.) Plaintiffs proposed that the case be tried in three phases, beginning with trial of the "factual and legal issues in plaintiffs' complaint and on defendants' legal defenses," with "[j]ury deliberations and *advisory* verdicts on the parties' damages-based legal issues," and ending with trial of the "equitable claim for imposition of constructive trust" and the "[c]ourt's rulings on this claim." (Italics added.)

Plaintiffs' motion in limine no. 2, styled a motion "To Exclude Rulings of Court on Cross-Complaint in Prior Case" (Motion in Limine No. 2), asked the trial court to exclude from the trial any mention or evidence of Judge Nevitt's ruling in *Lee v. Dobbs*, sustaining the demurrer to the cross-complaint on the ground that those claims could be brought only derivatively. Plaintiffs argued that mention of the outcome of plaintiffs' cross-claims would only confuse the jury, and was irrelevant to the present case.

The case was reassigned to Superior Court Judge John S. Meyer to preside over the jury trial. The trial commenced on August 25, 2010. Prior to beginning voir dire, Judge Meyer resolved some preliminary issues, including the motions in limine. Noting that there was no opposition to those motions, the court granted them without discussion. At the commencement of voir dire, the court described to the potential jury members the nature of the case, stating "this is . . . essentially a shareholder derivative suit." It also explained that plaintiffs claimed the damages were "the lost value of One Easy Loan, which is now worthless."

Once the court dismissed the jury after the first day of testimony, it considered defendants' motion for nonsuit based on plaintiffs' opening statement, arguing that plaintiffs have no evidence of damages. Plaintiffs explained that there had been an offer of a buyout at which time all parties agreed the company was worth about $4 million. The court responded, "[I]t's a . . . shareholder derivative suit so I suppose the damage to the corporation would be I guess the value of the buy-out." Plaintiffs' counsel agreed with that statement, and defendants' counsel did not specifically object to the court's characterization, other than to state there was no consummated buyout agreement. The court denied the nonsuit motion.

The trial proceeded with six days of testimony, followed by closing arguments. During his closing argument, plaintiffs' counsel urged the jury, if they found defendants' liable, to award plaintiffs the total value of the company, as that value had been agreed on by the parties at the time of the proposed buyout (approximately $4.6 million). Counsel also argued that damages should include the monies defendants made at PSL—monies they could not have made but for their looting of OEL's assets. Finally, he indicated the jury could look to OEL's projected future profits, as those projections had been developed by Lee and would have been realized but for defendants' wrongdoing.

For his part, defense counsel argued to the jury that OEL's downfall was attributable to Dodds' own actions—his mismanagement and his payments to himself upon leaving as CEO. But if the jury concluded that defendants had harmed the company, counsel continued, "the only thing left is to look at the value of the company." Counsel argued that value was zero because, at the relevant time, OEL had little cash on hand and was deeply in debt. Acknowledging that the jury could disagree with that valuation, counsel alternatively argued that it should measure damages initially by the value of OEL's stock, which defense counsel calculated, contrary to plaintiffs' estimate, as $1,329,157. Defense counsel went further, however. He argued that the jury should reduce that sum to only the value of the three plaintiffs' shares, and then further deduct the loans that remained outstanding to Lee and Wei for $175,000 each, and also the $86,000 that Dodds withdrew from OEL's accounts at the time he was discharged from his position as CEO. Plaintiffs' counsel objected to these arguments as misstating the law, but the trial court overruled the objection, stating: "The court will instruct the jury on the law."

On September 9, 2010, the court announced the jury's special verdict. The jury found that defendants Lee, Wei and PSL had diverted corporate opportunities of OEL, had converted its corporate assets, and had breached their fiduciary duties to plaintiffs and OEL. The jury did not find these defendants had acted with oppression, fraud or malice, and thus, did not award exemplary damages. It also did not find Christine Meng liable in any respect. It awarded plaintiffs a total of $187,898 in compensatory damages.

D. *Posttrial Proceedings*

After the jury was discharged, plaintiffs' counsel asked the court to schedule a special proceeding based on plaintiffs' position that the jury's verdict was advisory only, and the court should reject the jury's damages award and instead award the higher sum sought by plaintiffs. The court disputed counsel's characterization of the jury as advisory, stating it believed the trial was an action for damages on a breach of fiduciary duty claim, and that the only remaining task for the court was disposition of the constructive trust issue.[2] Nevertheless, the court agreed to set a special hearing on the issue of whether the verdict was merely advisory.

That hearing was held on September 23, 2010. The trial judge initially expressed dismay, in that he thought he had been misled by the parties regarding whether the claims were triable to a jury or not. After plaintiffs' counsel reminded the court that Motion in Limine No. 1 expressly used the term "advisory" multiple times, the court acknowledged that "I didn't read [the motion] before the trial. So it was an unopposed motion . . . in limine to try the equitable action, which I assumed to be the constructive trust after the jury case. That's all I looked at. I normally, as I indicated, don't read an unopposed in limine motion other than to see what it is." The court discussed with the parties' counsel the issue of whether plaintiffs had made clear that there was no right to a jury trial in this

2 The parties agreed to stipulate to the imposition of a constructive trust on the now-defunct PSL.

shareholder derivative case and sought advisory jury verdicts only. Ultimately, it concluded that "both parties have waived . . . the right to have an advisory jury . . . and I think . . . an estoppel is appropriate in this case."

The parties then discussed with the court the basis for plaintiffs' anticipated new trial motion and motion notwithstanding the verdict (JNOV). Plaintiffs explained that the jurors improperly had deducted from the damages the amounts defense counsel had urged them to deduct—the Lee and Wei loans and the final payments to Dodds. Plaintiffs contended that defendants had released all claims based on those loans and payments in *Lee v. Dobbs*. Furthermore, to properly raise that issue defendants were required to file a cross-complaint, which they did not do. Plaintiffs further argued that the correct measure of damages is the entire value of the company, as the jury was instructed in CACI Nos. 2102 and 3900, but the jury awarded plaintiffs only the value of their shares. Defendants disputed that any claims against OEL for the outstanding loans or final payments to Dodds were released. They also responded that no cross-complaint was required and they believed the issue of setoff was sufficiently raised in their general denial.

At the conclusion of the hearing, the court confirmed its ruling on the advisory jury question, directed defendants to prepare a judgment, and also directed the parties to brief and schedule a hearing on the new trial and JNOV motions. The court entered a written order on October 13, 2010, setting forth its conclusion that "the parties are estopped from making the claim that the Jury's verdict was advisory," and furthermore, had "waived their right to have this Court decide the case, if they in fact ever had that right." A written judgment reflecting the jury's special verdict was also entered on October 13, 2010.

The parties then submitted their briefs on plaintiffs' new trial and JNOV motion, as well as on plaintiffs' request for prejudgment interest. Accompanying plaintiffs' papers were two juror declarations describing how the jury, taking their cue from defense counsel's closing argument, calculated damages by first determining the value of plaintiffs' shares only, and then deducting the setoffs defendants claimed. On October 28, 2010, the court issued its tentative rulings. It first denied the motion for a new trial, stating "Plaintiffs have not shown irregularities in the proceedings, abuse of discretion, juror misconduct or bias, insufficient evidence to justify the verdict, that the verdict was against the law, or error in law." The court also denied the JNOV motion, finding that "Plaintiffs have not shown that the evidence received at trial is insufficient as a matter of law to support the verdict." Finally, the tentative order explained its ruling on the advisory jury issue, explaining that it "is not convinced that under the facts of this case a jury is not appropriate" because the case "is really an action for damages to Plaintiffs for the conduct of Lee and Wei." As to the setoff dispute, the court observed that the "procedural history of this case is confusing and convoluted. There were several deals and transactions between Dodds, Lee and Wei. There were debits and credits." The court concluded, however, that in the final analysis, "the jury properly considered the evidence before it in arriving at a reasonable damages figure. In any event, even if this is an equitable action, the Court believes that the verdict of the advisory jury was appropriate."

During the hearing on these motions, the trial court commented that although it did not believe there is a right to a jury trial in a shareholder derivative suit, it did not "think the law is as clear as [plaintiffs say] it is." Additionally, the court stated, the setoff issue was "not presented at trial certainly as clearly as it could have been." However, as to these questions, it found as follows:

> "What the jury did is what the court did, and would have done, and that is to determine whether the plaintiff shareholders lost money as a result of the actions of Lee and Wei. Who lent money, were owed money, allegedly, and there was never really evidence to the jury or to the court that it had been released in a prior lawsuit or was not pled. [¶] It came into evidence, I suppose there could have been an amendment according to proof had it been necessary. [¶] So the jury did what they considered to be fair. And they awarded damages based on all the evidence. That's what they did."

After additional argument, the trial court confirmed its tentative rulings. The court took the matter of prejudgment interest under submission, and thereafter court issued a minute order denying plaintiffs' request, finding that such interest "was not requested during trial as an item of damages."

E. *Plaintiffs' Motion to Tax Costs*

Both plaintiffs and defendants filed cost bills (defendants' was based on the fact that the jury found no liability as to defendant Christine Meng), and both sides filed motions to tax costs. The court granted plaintiffs' motion to tax costs, and defendants did not appeal that ruling. The court granted in part defendants' motion to tax costs. Among other items, the court disallowed $6,051.14 of the more than $11,800 sought for the cost of digitally scanning exhibits and creating graphics, on the ground that these costs "were incurred for the convenience and benefit of counsel." Plaintiffs appealed the costs and prejudgment interest orders, which appeal was later consolidated with the appeal from the judgment.

III. DISCUSSION

A. *The Trial Court Erred in Failing to Treat the Jury's Verdict as Advisory Only, Resulting in Prejudicial Error to Plaintiffs.*

1. There is No Right to a Jury Trial in Equitable Actions in California, and Case Law Holds that Shareholder Derivative Actions Generally are Equitable in Nature.

California does not recognize a constitutional right to a jury trial in equitable cases. As the Supreme Court explained in *C & K Engineering Contractors v. Amber Steel Co*. (1978) 23 Cal.3d 1, the constitutional right to a jury is guaranteed only insofar as that right "existed at common law in 1850, when the Constitution was first adopted." (*Id*. at p. 8.) "As a general proposition, '[T]he jury trial is a matter of right in a civil action at law, but not in equity.' " (*Ibid*.) The determination of whether an action is one in law or in equity, and thus whether the right to a jury trial attaches, turns not on "the form of the action," but rather, on "the nature of the rights involved and the facts of the particular case—the *gist* of the action." (*Id*. at p. 9.) " ' "A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law." ' " (*Ibid*.) "On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial." (*Ibid*.) The mere fact that damages may be sought is not determinative of the question. (*Ibid*.; see also *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1555.)

California cases have held that shareholder derivative actions are equitable in nature and, thus, no right to a jury trial exists. For example, we observed in *Caira v. Offner* (2005) 126 Cal.App.4th 12, that shareholder derivative claims for an accounting and a constructive trust, arising from defendant's alleged conversion of corporate funds, "are equitable," that the damages sought in that case "were based on *equitable*, not legal, claims," and accordingly, nothing in those claims gave rise to a right to a jury trial. (*Id*. at pp. 20, 26, 28-29.) In *Rankin v. Frebank Co*. (1975) 47 Cal.App.3d 75, the court held that an action seeking the involuntary dissolution of a corporation and recovery of "secret" profits allegedly diverted by controlling officers was one in equity, and thus no right to a jury trial existed. (*Id*. at 91-92.) Citing *Metcalf v. Shamel* (1959) 166 Cal.App.2d 789, the court observed that where recovery " 'was sought for the benefit of the corporation and the action was in the nature of a shareholder's derivative suit . . . [plaintiff] . . . had no constitutional right to a trial by jury.' " (*Rankin*, *supra*, 47 Cal.App.3d at p. 91; see also *id*. at p. 92 ["California entertains no right to jury trial in stockholders' derivative actions"]; see also *Rosenfeld v. Zimmer* (1953) 116 Cal.App.2d 719, 722 [shareholder derivative suit "is an equitable action;" case was tried to court without jury.)

In *Nelson v. Anderson* (1999) 72 Cal.App.4th 111 (*Nelson*), judgment was entered in favor of plaintiff upon a special verdict in which the jury found that defendant had violated certain fiduciary duties as a majority shareholder in a corporation in which plaintiff and defendant were the sole shareholders. On appeal, the court reversed, holding that plaintiff had no individual cause of action, and no standing to bring a derivative action (because of various procedural deficiencies). (*Id*. at pp. 122-123, 128.) The court held that plaintiff had no right to a jury trial—and that the jury's verdict therefore could only have been advisory—because she was suing a majority shareholder for breach of fiduciary duties. (*Id*. at pp. 122-123, citing *Interactive Multimedia Artists, Inc., supra*, 62 Cal.App.4th at pp. 1555-1556.) Importantly, for present purposes, the *Nelson* court concluded that plaintiff's claims were actually in the nature of a derivative action, and the action should have been brought on behalf of the corporation. (*Nelson, supra*, 72 Cal.App.4th at pp. 125-126.) Plaintiff's claims concerned defendant's "alleged misfeasance or negligence in managing the corporation's business, causing the business to be a total failure." (*Id*. at p. 125.) "Because the gravamen of the complaint is injury to the whole body of its stockholders, it was for the corporation to institute and maintain a remedial action." (*Id*. at pp. 125-126; see also *id*. at p. 127 ["When the injury is to the 'whole body of stock,' the action must be derivative."].) Plaintiff objected that treating the case as a derivative action would require an award of damages to the corporation, which in this case consisted of only plaintiff and defendant, and that in turn would allow the alleged wrongdoer to share in the damages. But the court, observing that "[a] shareholder derivative suit is an action in equity," responded that the trial court had the power to avoid that "nonsensical" result by distributing the damages equitably. (*Id*. at p. 127.)

We have no difficulty concluding that the case before us is a shareholder derivative lawsuit. First, it was brought after the trial court in *Lee v. Dobbs* dismissed similar claims arising from the same events, on the ground that they were derivative in nature. Second, plaintiffs' complaint was styled as a shareholder derivative action, in that OEL is named as a nominal defendant, and plaintiffs sued not individually, but in their capacity as OEL shareholders. Third, the complaint charged defendants with diversion of corporate assets and opportunities, and with breach of fiduciary duties owed to the corporation and all its shareholders, resulting ultimately in the demise of the corporation. Plaintiffs did not seek individual relief, but sought damages for the injuries to the corporation as well as specific equitable relief, including the imposition of a constructive trust. Indeed, during a break at the trial, the parties discussed with the court a potential standing issue regarding one of the plaintiffs. During that discussion, plaintiffs' counsel emphasized that even if that plaintiff had no standing, it did not impact the shareholder derivative suit because other plaintiffs existed, as the court and defense counsel acknowledged. Defense counsel also recognized that damages would be divided among all "legitimate shareholders of record," because the damages go to the corporation.

Thus, the gist of the action as pled was the harm done to the corporation as a result of defendants' violations of their duties to the corporation and to all the shareholders. The harm was the destruction of the company, and any injury to the shareholders—the loss of their share of the corporation's value—was merely incidental to that harm. (See, e.g., *Nelson*, *supra*, 72 Cal.App.4th at pp.124, 126 [plaintiff's proof established that any injury was to the corporation; hence, the alleged loss of her investment and her emotional distress were merely incidental to that injury].) Such a case is essentially equitable in nature. Majority shareholders "have a fiduciary responsibility to the minority *and to the corporation* to use their ability to control the corporation in a fair, just, and equitable manner. . . . [¶] . . . ' "Their powers are powers of trust." ' " (*Jones v. H.F. Ahmanson & Co*. (1969) 1 Cal.3d 93, 108 (*Jones*), italics added.) That power " ' "is at all times subject to the *equitable* limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary . . . . Where there is a violation of these principles, *equity* will undo the wrong . . . ." ' " (*Id*. at p. 109, italics added.)

Defendants argue that "[i]ndividual shareholder claims have been tried to a jury and the jury verdict affirmed on appeal," but the only case they cite is inapposite, precisely because, unlike this case, it involved claims of harm to *individual* shareholders independent of any harm to the corporation. (See, e.g., *Thompson v. Miller* (2003) 112 Cal.App.4th 327 [minority shareholders sued majority shareholder for fraud, concealment and breach of fiduciary duty in connection with latter's personal buy back of shares from minority shareholders].) Defendants also suggest that federal law supports their position—but as noted in *Rankin*, *supra*, 47 Cal.App.3d 75, California courts have never looked to federal law to determine whether a right to a jury exists under the California Constitution. (See *id*. at p. 92.) Finally, defendants argue that plaintiffs "left the door open to the possibility that they were pursuing claims as individual shareholders," and that "it was not at all apparent that [plaintiffs] even intended to pursue purely derivative claims," Among other things, defendants insist that the instructions given the jury do not negate the possibility that plaintiffs were seeking individual damages, and the special verdict form included a line awarding damages to "plaintiffs."

At best, these assertions are highly disingenuous. In pretrial briefs, defendants acknowledged the case was brought as a derivative action. They made no objection when the trial judge described the case to the jury as a derivative action. They expressly acknowledged, after the trial when plaintiffs raised the advisory verdict issue, that the case was "exclusively" a shareholder derivative action. The special verdict form not surprisingly used the term "plaintiffs" in regard to a damages award because that is who was seeking damages—on behalf of the company. And finally, instructions given the jury—including CACI Nos. 2100, 2102, 4100, 4101-4103, 3900, 3903N—are all entirely consistent with this being a shareholder derivative action. Indeed, they focus on duties owed to and harm suffered by the corporation, and to the extent they mention harm to plaintiffs, they are consistent with the notion that any such harm was suffered as a result of the injury done to the corporation by defendants' acts.

In sum, inasmuch as this is a shareholder derivative action that is equitable in nature, no right to a jury trial existed. As a matter of law, then, the special verdict rendered by the jury in this case was, and could only have been, advisory. (See, e.g., *Nelson*, *supra*, 72 Cal.App.4th at p. 123 [there may be an advisory jury in an equitable action].)

2. The Trial Court did not Properly Adopt or Reject the Jury's Verdict.

When a jury renders an advisory verdict in an equitable action, that verdict is not binding. The trial court is obligated to either adopt or reject it and make its own findings as it deems necessary and proper. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 109, p. 140.) The trial court here did neither.

After the verdict was rendered in this case, plaintiffs requested that the court convene a special proceeding to consider the jury's advisory verdict. The court disagreed that the verdict was advisory, stating "There's a breach of fiduciary duty, I don't think it's advisory." The court agreed with defense counsel that this was "a damages case," and that the only equitable claim was for a constructive trust, even though defense counsel expressly confirmed, in response to the trial court's inquiry, that this was "exclusively" a shareholder derivative case.[3] At the special hearing on plaintiffs' contentions regarding the advisory verdict, the court stated that it had been "misled" by plaintiffs into believing that the case was a regular jury trial for damages, and that it had no indication that this was an equitable action until after the verdict was rendered. It commented that the case had been conducted like any other jury trial. The court candidly acknowledged, however, that it had not carefully read plaintiffs' Motion in Limine No. 1 (in which plaintiff had discussed using an advisory jury) because it was not opposed, and it believed it to be nothing more than a simple order-of-proof motion. It also suggested the law was not clear on whether there is a right to a jury trial in shareholder derivative actions.

The court ultimately concluded that because of plaintiffs' conduct leading the court to believe that this was a legal action for damages rather than an equitable action, plaintiffs could not belatedly contend the verdict was advisory only. It expressed its holding both in terms of estoppel and waiver (specifically, plaintiffs had "waived the right to have an advisory jury"). The court then stated:

> "Now I can do—I can say let's all start all over, grant a new trial, I could do that. Or I could just say okay, you got an advisory verdict, I'm going to follow the advisory verdict. I'm not going to do

---

3 As noted previously, the parties eventually stipulated to the imposition of a constructive trust.

> that. I am saying that under the unique facts of this case, I don't know that you are not entitled to a jury. My visceral reaction is yeah, this is not an equitable action. The construction trust, yeah, that's equitable. There was no declaratory relief action, this is an action for damages. I'm not even sure it is even a shareholder derivative action."

In other words, in the final analysis, the trial court recognized that it could adopt the jury's verdict, but it expressly declined to do so. Thereafter, it entered an order setting forth its conclusion that the parties were barred on grounds of waiver and estoppel from raising the advisory jury issue, and also entered judgment on the jury's special verdict. The trial judge signed the judgment without any indication of his agreement with the verdict or his adoption of it. (See *Nelson, supra,* 72 Cal.App.4th at p. 123 [appellate court observed that the jury was not advisory, as indicated in part by fact that judgment was signed by trial judge with no indication of his agreement with or adoption of the jury's verdict].) Indeed, in the trial judge's mind, this was a jury verdict in a legal action, and the court expressly had disclaimed any intention of treating the case as equitable and adopting the verdict as its own.

Defendants contend, however, that the court "agreed" with the verdict when it denied plaintiffs' new trial motion. In its tentative ruling on those motions, which the trial court later confirmed, the court explained that "[a]lthough the Complaint is styled a derivative action, the Court is not convinced that under the facts of this case a jury is not appropriate. This is really an action for damages to Plaintiffs for the conduct of Lee and Wei." But it continued, "even if this is an equitable action, the Court believes that the verdict of the advisory jury was appropriate."

This does not constitute adoption of an advisory jury's verdict. First, the judgment already had been entered. The trial court had no power at that juncture to alter the nature of the judgment from a jury verdict to a court verdict, and defendants cite no authority suggesting otherwise. "Before entry, the judge may freely alter the judgment rendered. . . . But once the judgment is entered, the judge loses this unrestricted power to change it." (See Witkin, *supra*, Judgment, § 65, p. 600.) Judicial error may be corrected by the regular procedures for attacking a judgment, such as a motion for a new trial. (*Ibid*.) But in this case, the trial court used the vehicle of the new trial motion to affirm its belief that the case probably was not equitable and that plaintiff had a right to a jury. Its statement that, even if the case were viewed as equitable, it believed the verdict to be "appropriate," was at best an afterthought and, in our view, appears to have been more of an attempt by the trial court to "cover all its bases" rather than fulfill its obligations under the law as trier of fact.

3. Plaintiffs' Conduct, While it May have Confused the Advisory Jury Issue, Did Not Relieve the Court of its Obligations as Trier of Fact in an Equitable Action.

Although we conclude that the trial court did not fulfill its duty to adopt or reject the advisory verdict and make its own findings as needed, we are not unsympathetic to the position in which the trial judge found himself. Plaintiffs' attempt to request an advisory jury was, in our view, so imprecise that the trial court, not unreasonably, did not understand the import of that request. Thus, plaintiffs' Motion in Limine No. 1 was titled: "Motion *in Limine* No. 1 of 2 (to Order Proof of Issues at Trial)." Notably, the motion was not entitled "Request for Advisory Jury in Equitable Shareholder Derivative

Action"—a title that would have alerted the trial judge to the precise nature of plaintiffs' intention to seek an advisory jury. Instead, as phrased, the motion seemed addressed to the common question of the order in which the issues in the case should be tried. Additionally, there is no clear, unequivocal statement to the effect that, this being an equitable action, no right to a jury trial existed, and therefore, only an advisory verdict was appropriate. Plaintiffs dispute this, contending that the word "advisory" appears multiple times in that motion, and that they cited cases where advisory juries were utilized. That is true, but the way the term "advisory" is used is imprecise in the context of the entire motion. We quote at length from the motion to demonstrate the confusion resulting from plaintiffs' terminology:

"The second premise of this motion is that issues of fact *must be tried to the jury*." (Italics added.)

"The [c]ourt's power to order proof includes the power to hear equitable issues separately whilst *factual issues are tried to the jury*." (Italics added.)

"The [c]ourt properly decides equitable issues ***after*** *the jury decides the factual and legal issues*." (Italics added.)

Plaintiffs proposed that the "First Phase" of the trial should be the "Factual/Legal Issues," as follows: "Trial to the jury on the factual and legal issues in plaintiffs' complaint and on defendants' legal defenses; and . . . [j]ury deliberations and advisory verdicts on the parties' damages-based legal issues" and punitive damage factual issues.

The "Second Phase" involved trial of factual issues related to defendants' financial condition for purposes of exemplary damages, with "[j]ury deliberations and verdicts on exemplary damages."

The "Third Phase" of the trial was to be devoted to "Equitable Issues," as follows: "Trial *to the* [*c*]*ourt* of plaintiffs' *equitable claim for imposition of constructive trust*." (Italics added.)

"The order plaintiffs propose will permit the jury to make factual findings which will eliminate redundancy during trial of equitable issues. . . . Jury verdicts *will create law of the trial which will obviate the need for duplication*." (Italics added.)

What plaintiffs apparently intended to convey in their motion was that all issues in the case were equitable, and plaintiffs were merely seeking preliminary factual findings from an advisory jury. But much of the language of their motion is not consistent with that intention. Instead, it could reasonably be interpreted—and the trial court apparently did so interpret it, notwithstanding the occasional use of the word "advisory"—as describing the situation in which a case involves both legal and equitable issues, and the party seeks a jury trial on the "legal" and "factual" questions of the case, which would then bind the trial court (i.e., "create the law of the trial") to the extent they bear upon the equitable issues to be decided by the court. Indeed, from the words used, plaintiffs indicated to the trial court that certain issues "must" be tried to a jury. (See, e.g., *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 155-160 [contrasting situation in which all issues are equitable and judge empanels an advisory jury to make preliminary, non-binding determinations, with the actual situation in that case, where a jury determined factual and legal issues first, and those findings then bound the trial court to the extent they were applicable to the equitable issues].)

The confusion created by this motion was not eliminated by plaintiffs' citation of *Caira v. Offner*, *supra*, 126 Cal.App.4th 12, a copy of which was annexed to the motion. Plaintiffs did not expressly assert in their motion, as they do now, that *Caira* is authority for the proposition that there is no right to a jury trial in a shareholder derivative case, and that in such a case, a jury's verdict may be advisory only. Moreover, *Caira* did not involve the same claims alleged in this case; rather, the dispute concerned the issue of ownership of common stock and thus presented claims similar to declaratory relief or to quiet title. (See *id*. at pp. 23-29.)

If anything, plaintiffs' counsel only perpetuated the confusion at the outset of the trial, when the trial court asked, "How many causes of action are actually going to the jury?" The following colloquy ensued:

> "Mr. Lawton [plaintiffs' counsel]: It's a shareholder derivative case. What we're doing is asking for advisory verdicts on about, about eight questions. So there's three causes of action. So the questions are factual questions directed to each of the three causes of action, totaling eight.
>
> "The Court: But it's really a breach of fiduciary duty case.
>
> "Mr. Lawton: Yes.
>
> "The Court: That's really what it is, there's a derivative action.
>
> "Mr. Lawton: The whole thing is derivative.
>
> "The Court: Yes.

"Mr. Lawton: The counts are really for constructive trust based on conversion of corporate assets —

"The Court: I understand that.

"Mr. Lawton: — diversion of opportunities and for breach of fiduciary duty.

"The Court: The constructive trust is after the jury trial. That's pretty much based on what the jury finds.

"Mr. Lawton: Right, right."

In other words, notwithstanding counsel's clear statement that they were "asking for advisory verdicts on about . . . eight questions," the trial court appeared still to be under the impression that there was only one equitable issue—constructive trust—which the court would decide and which would depend on "what the jury finds."

The manner in which the trial was conducted only muddied the waters further. A chief characteristic of advisory juries is that because their verdict does not bind the court, the court is freed considerably from the formalities and constraints of a regular jury trial. As one commentator observed: "The invisibility of the advisory jury on appeal allows the trial judge to be informal, experimental, or even sloppy with the advisory jury without risk of reversible error. As a result, trial with an advisory jury may proceed with the same relaxed rules of procedure that judges typically use to increase trial efficiency when deciding cases themselves." (Note, *Practice and Potential of the Advisory Jury* (1987) 100 Harv. L. Rev. 1363, 1365.) By contrast, as the trial court here observed, the parties and the court all conducted this case as though it were a regular jury trial, with extensive opening and closing statements, objections, and a lengthy discussion of appropriate jury instructions.

We therefore can understand the court's frustration when, at the end of the trial, plaintiffs unexpectedly asked it to reject the "advisory" damages verdict. As warranted as that reaction may have been, however, it did not relieve the trial court from performing its duty to either adopt or reject the jury's verdict, and make its own findings as needed. Once it was directly confronted with the question, the court should have exercised its authority to determine that the issues tried were equitable, and to proceed accordingly. Finally determining after a trial that a jury's verdict is advisory is not unprecedented. In *Caira*, *supra*, 126 Cal.App.4th 12, the trial court consolidated three related actions, and impaneled a jury which thereafter rendered a special verdict principally in plaintiffs' favor. (*Id*. at p. 17.) After the verdict, the trial court determined that all of the actions (and not merely certain claims) were equitable and that the jury's verdict was therefore merely advisory. (*Ibid*.) The trial court then entered a judgment consistent in most respects with the jury's special verdict. (*Ibid*.)

The trial court's continuing authority—indeed, obligation—to assess before, during and after trial whether a case is properly tried to a jury, even where that task is made difficult by the parties' own conduct, was highlighted in *A-C Company, Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462. In that case, plaintiffs successfully amended their "breach of contract" complaint multiple times after the trial started to add promissory estoppel allegations, over defendant's repeated objections that such allegations, being equitable in nature, were triable to the court only and would require bifurcation of the trial. (*Id*. at pp. 468-470.) At the conclusion of the trial, again over defendants' objections, the trial court instructed the jury that it had found as a matter of law that there was no consideration to support the "breach of contract" claim, but submitted to the jury a special verdict form asking eight questions based on promissory estoppel and equitable defenses. (*Id*. at p. 470-471.) The jury found for plaintiffs and awarded damages, and the trial court denied both JNOV and new trial motions, while expressing reservations about whether the promissory estoppel issue should have been decided by the jury. (*Id*. at pp. 471-472.)

The appellate court reversed, holding that it was error for the trial court to submit to the jury claims that were based entirely upon the equitable doctrine of promissory estoppel. (*Id*. at pp. 473-474.) In so ruling, the court acknowledged that the problems in that case resulted from a failure to clearly define before trial what issues are to be tried, from counsel's "inadequate attention . . . to the state of the pleadings," and from the expectation of all concerned that once a jury is impaneled, a jury trial will proceed. (*Id*. at p. 475.) In such a situation, judges may become "trapped into trials that change their very nature well into the middle of the trial," and as a result, their "chances of avoiding error are seriously impaired." (*Id*. at p. 475.)

Similarly, the trial judge in this case found himself in the unenviable position of having to take the case away from the jury after a week of trial because of his own misunderstanding of the nature of the case, which was caused in no small part by plaintiffs' lack of clarity on the issues and the defendants' apparent acquiescence in trying the case to a jury. Even so, when the problem was squarely presented to it after the trial was over, the trial court had both the opportunity and the authority to correct it, as it recognized when it acknowledged it could simply adopt the jury's verdict. But it expressly declined to exercise that authority. This was error.

4. Plaintiffs Were Prejudiced by the Court's Failure to Treat the Jury's Verdict as Advisory, When a Court Trial Likely Would Have Resulted in A Larger Overall Damages Award.

Having determined that error occurred, we now address whether that error was prejudicial and requires reversal of the judgment, in whole or in part. We conclude that plaintiffs were prejudiced by the trial court's failure to treat the jury's verdict as advisory only, because had the damages issue been tried to the court, it is likely plaintiffs would have obtained a larger overall recovery. As we shall explain, notwithstanding that the trial court expressed general agreement with the jury's damages verdict -- and thus, plaintiffs would appear to have suffered no prejudice as a result of having a jury trial -- in fact, declining to treat that verdict as advisory deprived plaintiffs of one item of damages, namely, prejudgment interest. Because we conclude that it is reasonably probable the trial court would have awarded such interest had it acted as the trier of fact in this case, it is necessary to reverse that portion of the judgment concerning damages. We leave the liability portion of the judgment intact, because no error is claimed as to that portion, defendants did not appeal it, and the damages issue is separable from the liability determination. (See, e.g., 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, §§ 104, 105. pp. 697-699 [limited new trial may be granted as to damages portion of judgment only]; see also Code Civ. Proc. § 657 [new trial may be granted "on all or part of the issues"].)

As the court recognized in *Beasley v. Wells Fargo Bank, N.A.* (1991) 235 Cal.App.3d 1383, *denying* the right to a jury is an error of constitutional dimension, and is reversible per se. (*Id*. at p. 1396.) But as in *Beasley*, in this case "we deal with the erroneous *submission* of an issue to the jury." (*Ibid*.) "The erroneous grant of a jury trial or the improper submission of an issue to the jury is nothing more than a nonconstitutional procedural error." (*Ibid*.) In such a case, *Beasley* holds, the court is required to engage in the "traditional harmless error analysis for nonconstitutional error," pursuant to which prejudice is not assumed, but must be demonstrated by the appellant. (*Id*. at p. 1397; see also *California Shoppers, Inc. v. Royal Globe Insurance Co*. (1985) 175 Cal.App.3d 1, 35 [although court incorrectly submitted to jury the task of interpreting an insurance policy, no prejudice resulted because the jury, applying law as instructed to the undisputed facts, "reached the same result as the law-imposed duty dictated anyway"].)

Here, only the prevailing parties have appealed, and only the damages portion of the judgment is challenged. Accordingly, we inquire whether plaintiffs have shown that trying this case to the jury prejudiced them on the issue of damages. The task of showing such prejudice after trial is not an easy one. Our state Constitution provides that no judgment "shall be set aside, or new trial granted, in any cause, . . . for any [procedural] error, . . . unless, . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "The phrase 'miscarriage of justice' has a settled meaning in our law. . . . Thus, 'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) " 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " (*Cassim*, at p. 800.)

In this case, then, the trial court's error in failing to treat the jury's verdict as advisory is prejudicial only if it is reasonably probable that plaintiffs would have achieved a more favorable result on damages if the trial court itself had decided that issue. As it happens, we do not have to speculate what the trial court would have done, for the most part. In its written tentative ruling on plaintiffs' new trial motion, the court stated: "The Court believes that the jury properly considered the evidence before it in arriving at a reasonable damages figure. In any event, even if this is an equitable action, the Court believes that the verdict of the advisory jury was appropriate." And at the hearing on those motions, the court further explained:

> "What the jury did *is what the court did, and would have done,* and that is to determine whether the plaintiff shareholders lost money as a result of the actions of Lee and Wei. Who lent money, were owed money, allegedly, and there was never really evidence to the jury or to the court that it had been released in a prior lawsuit or was not pled. [¶] It came into evidence, I suppose there could have been an amendment according to proof had it been necessary. [¶] So the jury did what they considered to be fair. And they awarded damages based on all the evidence. That's what they did. [¶] . . . [¶] . . .
>
> "And I think what the jury did is what the court would do, and that is to value the shares based on essentially what everybody agreed the values were. And then you add up all the shares, but then Wei and

> Lee have money coming to them. So the most reasonable thing to do is to sort it out and give the shareholders the value of their shares, less what Lee and Wei are owed . . . [b]y the corporation." (Italics added.)

If we take these statements at face value, the error of trying the case to the jury would appear to be harmless, because had the trial court decided the case itself, it would have reached the same decision, considering all the same evidence regarding damages that the jury had before it, as well as counsel's arguments, and crediting the same evidence the jury credited. It therefore would appear that plaintiffs were not prejudiced by the error in this case, and that reversal on this ground would not be appropriate. But our inquiry does not end there. In one respect, the fact that this case was tried to a jury and not to the court made a quantifiable difference in the overall damages award, and that is because of the court's denial of prejudgment interest.

Civil Code section 3288 authorizes an award of prejudgment interest as follows: "In an action for the breach of an obligation not arising from contract, . . . interest may be given, in the discretion of the jury." (Civ. Code, § 3288.) The purpose of prejudgment interest to "to provide just compensation to the injured party for loss of use of the award during the prejudgment period—in other words, to make the plaintiff whole as of the date of the injury." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663; see also *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 526; *Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 665.) Because its function is compensatory, prejudgment interest is "in the nature of damages." (*Michelson v.*

Hamada (1994) 29 Cal.App.4th 1566, 1586; see also *Newby v. Vroman* (1992) 11 Cal.App.4th 283, 290.)

Although section 3288 by its terms authorizes only the jury to make such an award, "the trial court, *when acting as the trier of fact*, may award prejudgment interest under this section." (*Bullis v. Security Pacific National Bank* (1978) 21 Cal.3d 801, 814 fn. 16, italics added; see *Michelson*, *supra*, 29 Cal.App.4th at pp. 1586-1587.) The trial court here denied plaintiffs' request for prejudgment interest *only* because it "was not requested during trial as an item of damages"—in other words, because plaintiffs never made the request to the jury. By implication, then, had the case correctly been tried to the court, the trial court may well have exercised its discretionary authority to grant plaintiffs' request. The trial court indicated as much at the hearing addressing plaintiffs' request for prejudgment interest, when, in response to defense counsel's argument that his clients "believed they were wronged" and that an award of "further damages [i.e., prejudgment interest]" was unwarranted, the court stated, "[T]he only thing I would say is . . . [defendants'] actions were not commendable. . . . I don't think the jury particularly liked what Wei and Lee did." Finally, the amount of interest that could have been awarded at the statutory rate, even if the court had rendered the same underlying damages award as the jury, would not have been insignificant.

Prejudicial error therefore is present, and reversal of the damages portion of the judgment is warranted. On remand, a new trial must be held on the damages issue, and that trial, consistent with the foregoing discussion, must be to the court, not a jury (although the court may empanel an advisory jury in its discretion).

B. *The Trial Court Erred in Failing to Grant a New Trial Based on Defense Counsel's Improper Closing Argument*.

A new trial on damages is appropriate not merely because of the prejudicial denial of prejudgment interest, but also because of legal errors that tainted the jury's calculation of damages. Those errors stem from arguments made by defense counsel in the closing moments of the trial, urging the jury to make hundreds of thousands of dollars worth of deductions from any damages award. In denying plaintiffs' motion for a new trial, the trial court indicated it did not recognize these comments as erroneous under the applicable law, and declined to grant a new trial on damages based on those claimed errors. In fact, the court indicated it would have done precisely the same thing the jury did: "What the jury did is what the court would do." Because any new trial on damages after remand must be a court trial, we now focus on plaintiffs' challenges to the trial court's order denying a new trial, in order to provide guidance to the trial court when the damages issue is retried.

An order denying a motion for a new trial is reviewable on appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18; Code Civ. Proc., § 906.) " 'Although the trial court "is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal . . . [i]n our review of such order denying a new trial, . . . we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." ' " (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 969.)

1. The Use of Juror Declarations to Explain How the Jury Calculated Damages is Not Permissible Under Evidence Code Section 1150.

Before beginning our inquiry, we briefly address the evidentiary constraints on our examination of the record, and specifically, whether we may consider the two juror declarations plaintiffs submitted for the purpose of explaining how the jurors reached their damages verdict. We conclude that relying upon such affidavits for this purpose would run afoul of Evidence Code section 1150, and therefore, we decline to do so.

Evidence Code section 1150 allows a court, when inquiring into the validity of a verdict, to receive otherwise admissible evidence of "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such character as is likely to have influenced the verdict improperly." (Evid. Code §1150, subd. (a).) However, "[n]o evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (*Ibid.*) Courts have interpreted the statute as distinguishing " ' "between the proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . ." ' [Citations.] ' "The only improper influences that may be proved under [the statute] to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." ' " (*People v. Collins* (2010) 49 Cal.4th 175, 249, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1261; see also *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683 (*Mesecher*) [same].)

The line between what is an objective, verifiable and overt act, on the one hand, and evidence of a jury's subjective reasoning process, on the other hand, may be a difficult one to draw. We have held that evidence about "a jury's 'subjective *collective* mental process purporting to show *how* the verdict was reached' is inadmissible to impeach a jury verdict," and thus, juror declarations are not admissible where they at most show a " ' "deliberative error" ' " such as " '*confusion, misunderstanding and misinterpretation of the law*.' " (*Mesecher, supra*, 9 Cal.App.4th at p. 1683; some italics added.) Nevertheless, in cases addressing allegedly improper influences on a jury's calculation of damages, courts have held that juror declarations may be received to show that the calculation included improper elements—but only if they describe overt, objectively ascertainable acts and not mere subjective mental processes. (See, e.g., *Krouse v. Graham* (1977) 19 Cal.3d 59, 80-82 [juror declarations admissible to the extent they show jurors increased damages to include attorney's fees; case remanded so that trial court could determine whether declarations demonstrate overt, objectively ascertainable conduct or whether they merely described subjective reasoning processes of jury]; *Drust v. Drust* (1980) 113 Cal.App.3d 1, 8-9 [juror affidavits showing actual calculations were admissible to show that jury incorrectly included inconsistent elements of damage in the verdict, although court acknowledged affidavits could also be interpreted as revealing the jury's reasoning process]; but see *English v. Lin* (1994) 26 Cal.App.4th 1358, 1363, 1367 [juror declaration generally discussing what jurors "concluded" and that the verdict included amounts for lost earnings and earnings capacity not admissible to impeach verdict]; *Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1604-1605 [juror declarations that "recited the reasoning process the jury employed during deliberations to arrive at its damages figures" were not admissible]; *Ferreira v. Quik Stop Markets, Inc*. (1983) 141 Cal.App.3d 1023, 1033-1034 [criticizing *Drust*, and holding that affidavits describing how jurors reached their damages figures were inadmissible because they merely showed jurors' reasoning processes, and there was no improper external influence on jury or agreement among jurors to use patently improper formula].)

The juror declarations submitted by plaintiffs in this case are, in our view, most reasonably interpreted as general descriptions of *how* the jurors decided to calculate damages in this case—i.e., their subjective reasoning process. One juror states "[W]e agreed to give credits to [Wei and Lei]" for the outstanding loans and for the sums defense counsel "told us Mr. Dodds had taken from the company in March 2006." Another juror similarly states, "we [the jury] decided to give credits" to Lee and Wei; that "[w]e did not believe" the jury was supposed to measure damages by the entire lost value of the company; and that "we" would have awarded more damages "[h]ad we known" other facts. This second juror claims "we measured only" the losses to the three plaintiffs, rather than the entire loss to the company, and then "applied the credits to the defense listed above." She also states "we never would have given" those credits "[h]ad we known" that Lee and Wei had "dismissed and released all claims against OEL and Mr. Dodds."

Although these jurors purport to speak for all their fellow jury members, and one mentions an "agreement" as to how to calculate damages, they do not explicitly reference statements openly made by, or discussions among, any jurors during the deliberations.

Such open discussions arguably might be inferred under the circumstances, but lacking any such "overt" conduct or statements which may be objectively verified, the essential prerequisite of Evidence Code section 1150 is missing, and the court is left with nothing more than these two jurors' interpretation of how the deliberations proceeded. (See *English v. Lin*, *supra*, 26 Cal.App.4th at pp. 1363, 1367 [juror declaration generally discussing what jurors "concluded" and what verdict included was not admissible to impeach verdict]; *Mesecher*, *supra*, 9 Cal.App.4th at p. 1683 [evidence of a jury's " 'subjective *collective* mental process purporting to show *how* the verdict was reached' " was inadmissible].)

There are other problems with the declarations as well. For one thing, they baldly declare what the jury "would have done" had it known different facts. That is not even evidence of subjective mental processes; rather, it is pure *speculation* about what those processes might have been under different circumstances. For another, they describe a classic " 'deliberative error' "—that is, " 'confusion, misunderstanding and misinterpretation of the law' " regarding the correct measure of damages in a shareholder derivative action, as to which *Mesecher* instructs juror declarations are inadmissible to prove. (*Mesecher*, *supra*, 9 Cal.App.4th at p. 1683.) Finally, the declarations purport to describe how the comments of defense counsel during closing argument influenced their deliberations. Although Evidence Code section 1150 expressly allows otherwise admissible evidence of a statement occurring outside or inside the jury room in testing the validity of a verdict, it does not permit evidence to show the "effect" of such statement or conduct in influencing an individual juror's decision or concerning the juror's mental processes. (Evid. Code, § 1150, subd. (a).)

For all these reasons, we conclude that the juror declarations are not admissible to prove irregularities in the jury's calculation of damages or the effect of defense counsel's closing arguments on the jurors.

2. Because This is a Shareholder Derivative Action, Damages are Measured by the Value of What the Corporation as a Whole Lost, Not Merely the Value of What the Individual Plaintiffs Lost.

There was and is no dispute in this case that in a shareholder derivative action alleging conversion and diversion of corporate assets and opportunities, damages are measured by the value lost by the corporation as a result of defendants' wrongdoing. That is because the injury is to the corporation as a whole, and recovery is sought on behalf of the corporation and all shareholders, not merely the individual shareholder plaintiff. (*Jones*, *supra*, 1 Cal.3d at pp. 106-107 [distinguishing derivative claims from individual shareholder claims].) Defendants conceded as much on a number of occasions, and the jury was instructed accordingly. (See CACI No. 2012 [measure of damages for conversion is "the fair market value of the stock of [OEL] at the time [defendants] wrongfully exercised control over it]; CACI No. 3900 [damages include the "destroyed value of [OEL]" and the "value of lost profits [and] assets" of OEL].) The court's instructions did not allow the jury to award merely the lost value of the plaintiffs' own shareholdings.

Therefore, it would be error, on retrial of this issue, to limit damages solely to what the individual plaintiffs may have lost in terms of their individual shareholder value.

The fact that OEL has been dissolved does not alter the damages calculus. Dissolution does not destroy the ability of a shareholder to seek all appropriate relief on behalf of the corporation, including damages. (See Corp. Code, § 2010, subd. (a) [dissolved corporation continues its existence for, among other purposes, "prosecuting and defending actions by or against it"]; see also *Nelson, supra*, 72 Cal.App.4th at pp. 117, 127 [court held plaintiff should have brought a shareholder derivative action on behalf of failed company].) And any recovery achieved for the now-defunct company may benefit all of OEL's shareholders, including but not limited to the plaintiffs. (Friedman and Fotenos, Cal. Practice Guide: Corporations (The Rutter Group 2012) ¶ 6:619.5, p. 6-138.8 ["dissolution itself does not deprive a shareholder of standing to bring a derivative action," and a dissolved corporation's shareholders "stand to benefit from . . . any recovery pursued for the corporation's benefit"].) Defendants expressly acknowledged this at trial, when their counsel conceded that any damages would be "divided up" by OEL's "legitimate shareholders of record."

Moreover, the trial court, sitting in equity, has the power to distribute any recovery in an equitable manner to ensure that defendants—who were also OEL shareholders—do not profit unjustly from their own wrongdoing. (See *Nelson*, *supra*, 72 Cal.App.4th at p. 127 [because a derivative suit "is an action in equity . . . the court may equitably distribute damages . . . to avoid any such 'nonsensical' result"]; *Rankin*, *supra*, 47

Cal.App.3d at p. 96 [recognizing that court may "equitably distribute damages" in a shareholder derivative action].)[4]

3. It Was Error to Permit Defendants to Seek As "Setoffs" the Outstanding Loans to OEL and the Payments to Dodds.

Lee and Wei's basic defense to plaintiffs' claims was that OEL failed due to Dobbs' mismanagement and misleading of investors about OEL's prospects, and not due to any wrongdoing on their part. They argued, for example, that OEL had substantial cash on hand by the beginning of 2006, but then Dobbs depleted those funds by, among other things, paying himself approximately $86,000 in salary, commissions and reimbursement of expenses. Lee and Wei also contended that they were under no obligation to continue to pour money into a losing venture, even though they did lend OEL an additional $350,000 to pay off some of OEL's debts. Defense counsel asserted at closing argument that if the jury concluded defendants misappropriated OEL assets, the proper measure of damages was the lost value of the company, and further, that the value was essentially nothing, as OEL was heavily in debt during the relevant time. However, assuming the jury believed there was some value, defense counsel argued, the relevant measure was "the value of its stock." Counsel then argued that this amount was

---

4 We offer no opinion here on how the court, on retrial of the damages issue, should calculate the value of what the corporation lost. The jury was told they could award, for example, the fair market value of OEL stock, lost projected profits, and the value of OEL's software and other assets. We note the parties appeared to be in agreement that the correct measure was the fair market value of OEL stock, although they offered different valuations of either $1.06 or $1.42 per share. We have no doubt the trial court will give due consideration to all the relevant, admissible evidence in determining the destroyed value of OEL as a whole, and not merely the value of what the named plaintiffs lost.

calculated first by multiplying the number of shares outstanding (1,253,922) by the proposed per-share value of $1.06 (which counsel calculated by using the proposed buyout amount for one of the plaintiffs' shares), resulting in a total value of $1,329,157.

At that point, defendants' counsel urged the jury not to award that entire value, but first to deduct the value of everyone's shares except for the three plaintiffs, and then to offset that amount by the $350,000 in the loans Lee and Wei made to OEL, as well as the $86,000 that Dodds was paid. Plaintiffs' counsel promptly objected to these calculations as "a misstatement of the law," but the court overruled him, stating "[t]he court will instruct the jury." Although the trial court appears to have instructed the jury that damages in the case were measured by the destroyed value of OEL or the "fair market value" of its stock, there is no indication that the court in any way addressed plaintiffs' objection to defense counsel's closing argument or gave any limiting instructions to the jury regarding the same.[5]

In their motion for a new trial, plaintiffs contended that it was error to allow defendants' argument regarding damages. First, plaintiffs asserted, because the case is a shareholder derivative action, where damages consist of the company's lost value as a whole and there are no individual damages, it was error for defendants to argue that the jury should exclude from the damages award all shareholder value except that attributable to the three plaintiffs. Second, plaintiffs contended it was error to allow defendants to

---

5 The parties waived reporting of the reading of the instructions, so we do not have the court's precise language before us. The record, however, contains the jury instructions presumably read to the jury.

seek setoffs representing the loans to defendants and payments to Dodds, because defendants had released any claim they may have had to recover those sums in *Lee v. Dobbs*, and because defendants unfairly surprised plaintiffs with this argument without having first explicitly pled a cross-claim or defense of setoff on this issue. The trial court denied a new trial on this ground, reasoning that "[t]he procedural history of this case is confusing and convoluted. There were several deals and transactions between Dodds, Lee and Wei. There were debits and credits. The Court believes that the jury properly considered the evidence before it in arriving at a reasonable damages figure."

This explanation widely misses the mark. Regardless of whether defendants had released the claimed sums in the earlier case, and assuming these sums are properly characterized as "setoffs" at all, defendants utterly failed to plead the defense of setoff in a manner required by law and basic concepts of fair notice. It was error, therefore, for the trial court not to grant a new trial on this ground. [6]

We first address the meaning of "setoff." Black's Law Dictionary defines "setoff" as "[a] defendant's counterdemand against the plaintiff, arising out of a transaction independent of the plaintiff's claim." (Black's Law Dict. (9th ed. 2009), p. 1496, col. 1.) The Code of Civil Procedure addresses setoffs as follows: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such

---

6 We offer no opinion on the court's finding regarding the "confusing" procedural history of the case, and on the question whether the setoff claims had been released by defendants. Although we tend to agree the current record is unclear on that issue, we leave it to the trial court and the parties to sort out these matters on retrial, if necessary.

person, the other person *may assert in the answer the defense of payment* in that the two demands are compensated so far as they equal each other . . . ." (Code Civ. Proc., § 431.70, italics added.) The California Supreme Court has held that this provision "permits a defendant in a civil action *to assert a claim for relief in its answer and allege*, in effect, that the defense claim constituted prior payment for the plaintiff's claim and therefore should be set off against any award in the plaintiff's favor." (*Construction Protective Services, Inc. v. TIG Specialty Insurance Co.* (2002) 29 Cal.4th 189, 192, italics added.) Statutory setoff is an equitable doctrine based on the principle that " 'either party to a transaction involving multiple debts and credits can strike a balance, holding himself owing or entitled only to the net difference . . . .' " (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744.)

As *Construction Protective Services, Inc. v. TIG Specialty Insurance Co., supra*, 29 Cal.4th 189, makes clear, and contrary to plaintiffs' contention, a cross-claim was not necessary unless defendants were seeking a net recovery. (*Id.* at p.198 ["We hold that a defendant may not obtain an award of affirmative relief against a plaintiff by way of [Code of Civil Procedure] section 431.70; rather, the defendant may only assert the setoff defensively to defeat the plaintiff's claim in whole or in part."].) But what is striking about the statutory language, as well as the language of the Supreme Court's decision, is the clear implication that the *defense* of setoff (or payment) must explicitly be *asserted* in the answer for a defendant to obtain relief, in whole or in part, from the damages sought by the plaintiff. Defendants concede that they did not do this in their answer, and indeed, their counsel stated they "figured it's covered by a general denial." Moreover, defendants never hinted that they would be seeking setoffs in their pretrial pleadings—such as the joint trial readiness conference report , their Trial Brief, or by pretrial motion—or even in opening argument.

Defendants respond that affirmative allegations of setoff are not required, citing *Bidart Bros. v. Elmo Farming Co.* (1973) 35 Cal.App.3d 248. That case predates the Supreme Court's decision in *Construction Protective Services, Inc. v. TIG Specialty Insurance Co.*, *supra*, 29 Cal.4th 189, and in any event, does not hold that allegations of setoff are not required. In fact, the court in that case *presumed* that such affirmative allegations were required, but held that the trial court properly allowed defendants to amend their answer to conform to the proof at trial. (*Bidart Bros*., at pp. 259-260.) There is no dispute that defendants here neither requested, nor were granted, leave to amend their answer to conform to the proof at trial (although the trial court acknowledged that might have been an option).

Based on the size of the jury verdict alone, we have little trouble in concluding that the trial court's error in permitting defendants to seek setoffs for the loans and payments to Dodds for the first time in closing argument was prejudicial to plaintiffs. Although we may not consider the juror declarations to determine how the jurors made their damages calculations, it is reasonable to conclude from the limited damages awarded that defense counsel's closing arguments had an impact. Plaintiffs' damages evidence, if credited, would have resulted in an award anywhere from $1,793,349.24, which represents the value of OEL's stock as of March 2006, priced at $1.42 per share, to $4.06 million or beyond, which reflects the valuation of the company as of the proposed buyout, as well as potential future profits. Defendants principally argued that the company's value was zero because it was deeply in debt with insufficient cash on hand. *Alternatively*, defendants argued that if the jury found defendants liable for wrongdoing, they should value the company's stock at $1,329,157. Because the jury found against defendants on liability and also concluded that the corporation's loss had value, one would have expected that, at a minimum, and consistent with the evidence and the court's instructions, the jury would have awarded as damages a sum more in keeping with either plaintiffs' or defendants' valuation of the stock of the entire company. They did not, and we believe the result is likely attributable to defense counsel's improper argument.

Defendants respond that in light of all the evidence, the jury properly could have awarded damages in an amount anywhere from zero to $4 million or more, so the award of $187,898 was supported by substantial evidence in and of itself, without regard to whether it was influenced by defense counsel's closing argument. Whether or not the jury properly could have concluded that OEL had a lost value of zero because of its poor balance sheet, the fact is, it did not make that finding. Rather, the jury concluded that the corporation had value that was lost as a result of defendants' wrongdoing, and merited compensation in the form of damages. In determining what value to attribute to those losses, the jury had a measure on which both parties agreed—the value of the company's stock. On that issue, the parties' evidence was conflicting but fairly definite, and indeed, both parties helpfully aided the jury by providing it with specific calculations backed up by the documentary evidence.

Thus, the evidence here arguably supported zero damages, or—if the court's instructions were followed and defendants' improper closing argument had not been allowed—some amount ranging from $1.3 million to $4 million or more. There is no evidence, and defendants point to none, supporting the damages actually awarded by the jury, or any number approximating that sum. Damages calculations need not be precise, and as defendants point out, a jury may properly weigh conflicting damages evidence and arrive at a sum within the range of possible verdicts supported by the parties' evidence. (See, e.g., *Liberty Mutual Insurance Co. v. Industrial Acci. Com.* (1948) 33 Cal.2d 89, 94 [jury properly may award damages somewhere between the damages estimations of parties' experts]; *San Diego Metropolitan Transit Development Board v. Cushman* (1997) 53 Cal.App.4th 918, 930 [verdict on severance damages was between the figures the parties had proposed].) Here, however, the damages awarded were *outside* the range the parties' evidence had established (i.e., either $0, *or* between $1.3 million and $4 million). Nevertheless, we do not have to presume the jury simply pulled a number out of the air, because the record (even disregarding the juror declarations) suggests a logical explanation for the damages verdict the jury rendered: the jury started their calculations with an agreed-upon value of the corporation's stock, consistent with the court's instructions, and then, crediting defense counsel's erroneous argument, made deductions, first, to reflect only the individual plaintiffs' share of the stock's value, and second, for monies supposedly owed to defendants and monies supposedly wrongly paid to Dodds. Performing that relatively simple mathematical calculation, as suggested by plaintiffs in their brief, results in a number closely approximating the jury's verdict.

Accordingly, it is reasonably probable that, in the absence of defense counsel's improper closing argument, the damages award in this case would have been larger, and thus, the error in permitting that argument was prejudicial. (See, e.g., *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872 [where need for airport parking and suitability of defendant's land for that purpose were critical to issue of valuation in condemnation case, court found it "reasonably probable" that jury would have arrived at a different verdict in the absence of defense counsel's improper argument in which he misrepresented that there was no need for additional parking].) Because the trial court indicated it would have determined damages in the same manner as the jury did, we emphasize that on retrial, the trial court should measure damages in a manner consistent with the instructions the jury received.

The question remains whether, on retrial, defendants are barred from asserting any sums in setoff. In our view, there is no basis for precluding such allegations so long as they are pled consistent with the law, and so long as plaintiffs are given a fair opportunity to supplement the record with any admissible evidence refuting defendants' entitlement to recover such sums—an opportunity they did not have previously.[7] Additionally, we

---

[7] To be sure, evidence was adduced at trial regarding the circumstances of the payments to Dodds, and the fact that Lee and Wei made loans to OEL, the reasons for those loans, and whether or not they had been repaid. But that evidence came in principally as proof of who was responsible for OEL's failure. Because defendants did not explicitly seek a setoff until closing argument, plaintiffs had no reason to believe that was in issue, and thus had no incentive to fully develop proof regarding Lee and Wei's entitlement to use those sums to reduce the damages award in this case. In fact, the parties were precluded from delving in any detail into the circumstances and outcome of *Lee v. Dobbs*, and the trial court acknowledged the jury never heard evidence on the

again observe that a trial court sitting in equity has the power to equitably distribute damages as the facts and circumstances warrant. (See *Nelson*, *supra*, 72 Cal.App.4th at p. 127.)

The trial judge will also need to consider whether both these setoffs, if alleged in connection with the new trial, are properly raised by *defendants* in the context of this shareholder derivative action. As explained previously, in such a case, plaintiffs sue on behalf of the corporation for wrongs committed to the corporation, and any damages in such a case were suffered by the corporation. Defendants' setoff claim regarding the loans reflects a debt owed *to the defendants* by the corporation. But the claim regarding alleged improper payments to Dodds is in a different category. It reflects, potentially, a debt owed *by Dodds* to the corporation. In effect, then, in this shareholder derivative action, defendants sought setoff relief on 1) an individual claim against OEL (the loans) that otherwise would have been the subject of an *individual* action by defendants against the company, and 2) what effectively was a *derivative* claim (the payments to Dodds) that, at most, belonged to OEL, not defendants, but that defendants nevertheless were asserting for their personal benefit, *and their benefit alone*, rather than for the benefit of the corporation and all shareholders.[8] This raises certain critical questions, including

---

settlement and releases in that case. On retrial, the parties should be given a full and fair opportunity to develop those facts as necessary, should defendants again choose to allege a setoff defense based on these claims.

8 In this regard, we also observe that, if, as we conclude here, the jurors followed defense counsel's suggested method of calculating damages, they necessarily deducted the loans and Dodds payments only from the individual plaintiffs' share of the company's

whether defendants have standing to allege a derivative claim without fulfilling the necessary procedural prerequisites (see *Nelson*, *supra*, 72 Cal.App.4th at p. 127), and assuming they do, whether defendants may allege both individual and derivative setoff claims in the context of this shareholder derivative action, especially when the only ones to benefit from any relief for such claims would be the defendants themselves. (See, e.g., *First Security Bank of California v. Paquet* (2002) 98 Cal.App.4th 468, 474,475 [explaining that shareholder plaintiff in derivative suit acts only in a representative capacity; accordingly, defendant Bank could not obtain relief on a cross-claim against that plaintiff in an individual capacity].) Since neither the parties nor the trial court addressed these questions, we do not resolve them here but leave it for the court's determination on retrial of the damages question.

C. *The Trial Court's Order Denying Prejudgment Interest Is Vacated*.

Previously in this opinion, we determined that the trial court erred in not treating the jury's verdict as advisory only. We also concluded that plaintiffs were prejudiced by this error in that they were denied prejudgment interest, an "item of damages," solely because the court did not sit as trier of fact. (See *Michelson v. Hamoda, supra*, 29 Cal.App.4th at p. 1586.) For this reason, we held that the judgment must be reversed as to damages, and a new trial held on that issue. Consistent with this determination, any new trial must be tried to the court (although the court could impanel an advisory jury on

---

value, not from the entirety of that value. Consequently, even though the loans were potentially a debt of the company (and thus, by extension, an obligation of all the shareholders), these three shareholders alone would in effect have borne the entire burden of that obligation—an injustice that the trial court, sitting in equity on retrial of the damages issue, may avoid.

the issue, in its discretion). Accordingly, we vacate the order denying prejudgment interest. Plaintiffs may renew their request for such interest to the court at the new trial on damages.

D. *The Trial Court's Order Taxing Certain Costs Was Within its Discretion*.

In the consolidated appeal, plaintiffs ask us to reverse that portion of the trial court's order on costs that denied plaintiffs recovery of the cost of digitally scanning trial exhibits and creating graphics for use during trial.[9] Because we reverse only that portion of the judgment concerning damages, plaintiffs' appeal as to costs is not mooted, and we now consider the merits of that appeal.

We review orders taxing costs for abuse of discretion. (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 617.) As plaintiffs observe, discretion is abused "whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered." (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815.) We conclude plaintiffs have not met their burden of demonstrating that the court's decision to tax the scanning and graphics costs fell outside " 'the permissible range of options set by the legal criteria.' " (*Ibid*.)

Plaintiffs' costs bill included a charge of $11,840.27, representing the cost of the production and display of graphics and exhibits during the trial. Plaintiffs opted to use Trial Director, described by plaintiffs' counsel as a software program that not only

---

9 The trial court disallowed some other costs as well, but plaintiffs do not challenge those rulings on appeal.

permits electronic projection of exhibits on a screen, but also allows counsel to enlarge and highlight portions of an exhibit during examination of witnesses. Plaintiffs contend that use of this software resulted in a substantial savings of time and effort, as compared to the use of traditional paper copies of exhibits. The trial court disallowed $6,051.14 of the total expense incurred, representing the cost of digital scans and graphics, finding that those costs were "for the convenience and benefit of counsel" and, therefore, presumably were not "reasonably necessary to the conduct of the litigation," as required by Code of Civil Procedure section 1033.5, subdivision (c)(2). The trial court provided some insight into its reasoning at the hearing on costs, when it observed that the "an alternative would [have been] to just display [the exhibits] on an Elmo. You had the copies."

Plaintiffs challenge the court's decision to disallow these costs as arbitrary and without any reasonable basis.[10] They note that defendants used the same technology, and did not dispute that the use of Trial Director aided the court and jury and shortened the trial considerably. Citing *El Dorado Meat Co.*, plaintiffs assert that the court's failure to compensate parties for the use of more efficient and advanced technologies, and instead require use of the more traditional means of trial presentation, reflects "poor policy" and will result in delay and frustration in future cases for the parties, the jurors and the courts.

---

10 The trial court allowed plaintiffs to recover other costs incurred in connection with the presentation of the exhibits during trial, including the cost of projectors. Contrary to plaintiffs' suggestion that the trial court simply "split the baby exactly in half" and thereby settled on some arbitrary costs figure, the record shows that the disallowed amount reflects precisely the graphics and scanning charges—and only those charges. Put another way, the court's ruling was targeted at specific costs, allowed $5,789.13 in other media-related costs, and, accordingly, was not arbitrary.

(See *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.*, *supra*, 150 Cal.App.4th at p. 620 [affirming trial court's allowance of costs incurred in creating an exhibit summarizing important financial data, and observing that "[t]he idea that the cost is not allowable because the exhibit could have been created using adding machines, ledger paper, and pencils instead of an electronic database is antiquated"].)

We have no reason to question plaintiffs' assessment of the benefits associated with the use of Trial Director and similar technologies, and if the trial court had allowed those costs, we might well have affirmed that ruling against defendants' challenge. But the issue here is not what this court might have done in the face of a different ruling, or what it might have done in the first instance. Rather, the question on this appeal is whether the trial court's decision to disallow those costs falls outside "the permissible range of options" permitted by the law. (*Dorman v. DWLC Corp.*, *supra*, 35 Cal.App.4th at p. 1815.) Plaintiffs have not satisfied their burden of so showing.

El Dorado Meat Co., *supra*, 150 Cal.App.4th 612, demonstrates that permitting the recovery of costs associated with the use of modern technologies may well be within a trial court's discretion, but nothing in that or in any other case cited by plaintiffs suggests that disallowing such costs *necessarily* is an abuse of discretion. The statute requires that all allowable costs "shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd. (c)(2).) The trial court observed the use of this technology in court every day, and therefore was in the best position to make the determination of whether it truly aided the jury and was necessary to the conduct of the trial. (See, e.g., *Santantonio* *v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 121 [" ' "The trial court was in a far better position, having heard the entire case . . . to . . . determine what was . . . reasonably necessary." ' "], italics removed.) Plaintiffs contend that they "prepared to display" over 680 exhibits (more than 2,800 pages) via Trial Director, but according to the transcript, only 96 exhibits were identified during the trial, just 72 were received into evidence during those proceedings, and the record on appeal includes just over 100 trial exhibits. It is unclear whether all of these exhibits were displayed via Trial Director, although in many instances they clearly were. But there is no indication that *every* exhibit plaintiffs prepared for display via Trial Director was necessary, or was admitted or even used at the trial, and defense counsel's declaration in support of their motion to tax costs indicates that plaintiffs used Trial Director only "sporadically."

In these circumstances, we perceive no abuse of discretion in the trial court's finding that the use of Trial Director in this case was principally for the convenience of counsel. Contrary to plaintiffs' contention, the trial court was neither "cursory" nor "dismissive" in addressing this cost. The costs hearing focused exclusively on that issue, plaintiffs were given ample opportunity to argue their position, and the court revealed its reasoning on the record, albeit not in great detail. (*Compare Acosta v. SI Corp*. (2005) 129 Cal.App.4th 1370, 1380 [appellate court noted that "absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty," but held in that case that the trial court abused its discretion when it explicitly stated it did not want to go through each challenged cost individually].) Accordingly, we affirm the trial court's decision to disallow some, but not all, of the total media-related expenses incurred by plaintiffs.

DISPOSITION

The judgment is reversed on the issue of damages only, and the case is remanded for a new trial on that issue, to be conducted in a manner consistent with this opinion. In all other respects, the judgment is affirmed. The trial court's order denying prejudgment interest is vacated, and its order granting defendants' motion to tax certain costs is affirmed. The parties shall bear their own costs on appeal.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.